STATE OF MICHIGAN

COURT OF APPEALS

ROBERT HENRY AND FAYE HENRY,

Plaintiffs-Appellants/Cross-Appellees,

v

CORNELIUS ROGERS JACKSON,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
May 14, 1999

No. 200208
Genesee Circuit Court
LC No. 93-24376 NI

Before: Markman, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action entered by the trial court against plaintiffs, following a jury trial. Defendant cross appeals the trial court's failure to award offer of judgment sanctions pursuant to MCR 2.405(D). We affirm plaintiffs' appeal and reverse defendant's cross appeal.

I

This personal injury liability suit arises from the collision of two trucks at an intersection. Plaintiff's truck turned left in front of defendant's oncoming truck at an intersection controlled by a traffic light. The dispute that was tried to the jury concerned who had the right of way and focused on issues of speed and the color of the traffic light. Prior to trial, the case was mediated in the amount of $100,000. The mediation was not unanimous. Plaintiffs then made an offer to stipulate to entry of judgment in that amount, to which defendant replied with a counteroffer of $10,000. The counteroffer was rejected and, as the case neared trial, defendant made an offer of judgment in the amount of $25,000. This offer was not responded to by plaintiffs. A four-day jury trial ensued, resulting in a verdict of no cause of action against plaintiffs. Following the trial and verdict, defendant's motion for offer of judgment sanctions was heard by the trial court. Despite the fact that the verdict was more favorable to defendant than his previous offer of judgment, the trial court denied all costs and attorney fees. A corresponding order of judgment, from which plaintiffs now appeal and defendant cross appeals, was entered on November 30, 1995.

II

Plaintiffs first contend that their cross-examination of defendant's accident reconstruction expert at trial was unfairly prejudiced by plaintiffs' lack of access to defendant's medical records. We disagree.

Prior to trial, plaintiffs' counsel sought to obtain defendant's medical records based on speculation that defendant may have been suffering from some type of mental impairment or medical condition which may have contributed to defendant's alleged negligence. Although plaintiffs originally brought a motion to compel production of defendant's medical and no-fault records, at a hearing on plaintiffs' motion to compel plaintiffs withdrew their request and agreed that defendant's medical records were privileged.[1]

On appeal, plaintiffs now claim that their cross-examination of defendant's accident reconstruction expert was unfairly prejudiced by plaintiffs' lack of access to defendant's medical records. Plaintiffs argue that defendant's accident reconstruction expert had given a medical opinion with regard to defendant's medical condition when the expert testified that defendant may have been confused when he discussed the traffic light cycle. However, our review of the record clearly indicates that the opinion given regarding this matter by the expert, a mechanical engineer, was that of a layman and not of a medical expert. Accordingly, there was no need for plaintiffs' access to defendant's medical records for effective cross-examination. Under these circumstances, we find plaintiffs' argument to be without merit.

III

Plaintiffs next contend that the trial court erred in denying their motion for judgment notwithstanding the verdict or a new trial because of alleged inconsistencies between defendant's testimony and the testimony of defendant's accident reconstruction expert. The sole basis for plaintiffs' argument is that "the defendant's capacity to accurately relate events was directly, clearly, and positively called into question by defendant's own expert witness when he testified he disagreed with defendant." No authority is advanced for the proposition that the testimony of defendant and defendant's expert must be totally consistent. A party may not leave it to this Court to search for authority to sustain or reject its position. *Troy v Papadelis (On Remand)*, 226 Mich App 90, 95; 572 NW2d 246 (1997). Plaintiffs do not otherwise allege that the verdict was against the great weight of the evidence or that the evidence, viewed in the light most favorable to the nonmoving party, failed to establish a claim as a matter of law. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). The issue is therefore meritless.

IV

Plaintiffs further allege that defendant interjected his medical condition at trial and they were denied their right to cross-examination regarding this issue when the trial court granted defendant's request for a protective order preventing plaintiffs from deposing defendant's physicians and barring any discovery with regard to defendant's medical records. However, as previously noted, plaintiffs conceded prior to trial that defendant's medical records were privileged and therefore the issue has been waived.

V

Plaintiffs next contend that the trial court committed error requiring reversal in failing to give a requested supplemental jury instruction derived from *Barnum v Berk*, 256 Mich 363, 367; 239 NW 329 (1931), setting forth the proposition that a driver who is turning has "a right to assume that the driver of the oncoming car, if it is a reasonably safe distance away, will see him commence to turn or cross and slow up or stop, if necessary."

As explained in *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 422-423; 493 NW2d 447 (1992), aff'd 444 Mich 508; 510 NW2d 184 (1994):

> The trial court has discretion to give additional instructions not covered by the standard jury instructions as long as they are applicable and accurately state the law and are concise, understandable, conversational, unslanted, and nonargumentative. MCR 2.516(D)(4); *Wengel v Herfert*, 189 Mich App 427, 431; 473 NW2d 741 (1991). A supplemental instruction need not be given if it would add nothing to an otherwise balanced and fair jury charge and would not enhance the ability of the jury to decide the case intelligently, fairly, and impartially. *Houston v Grand Trunk W R Co*, 159 Mich App 602, 609; 407 NW2d 52 (1987).
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> On appeal, jury instructions are reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. . . . There is no error requiring reversal, if on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. . . . The trial court's decision regarding supplemental instructions will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. [Citations omitted.]

In the instant case, the instructions ultimately given by the trial court included requested standard jury instructions. Our review of the record indicates that these instructions adequately addressed the duties of each driver with respect to the subject intersection and provided sufficient grounds on which the jury could evaluate those duties and determine which party, if any, had violated their duty under the law. The supplemental instruction requested by plaintiffs provided no additional considerations for the jury and would have been redundant. The instructions, taken as a whole, clearly and accurately set forth the theories of the parties and the applicable law. Therefore, the trial court did not abuse its discretion in refusing to give the supplemental instruction. *Mull, supra*.

VI

Plaintiffs lastly contend that because defendant allegedly asserted inconsistent positions at trial, the trial court erred in denying their motion for directed verdict on the basis of judicial estoppel. We disagree.

The doctrine of judicial estoppel precludes a party as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation. *Michigan Gas Utilities v*

Public Service Commission, 200 Mich App 576, 583; 505 NW2d 27 (1993). The doctrine generally applies to instances in which the party subsequently asserting a contrary position prevailed in an earlier proceeding. *Id*.

The doctrine has no application to the present circumstances. Discrepancies between the calculations of defendant's expert and the estimations of defendant are not tantamount to internally conflicting legal theories that warrant the imposition of judicial estoppel. Indeed, plaintiffs cite no authority in support of such a proposition. Plaintiffs' argument is therefore without merit.

VII

On cross appeal, defendant asserts that the trial court abused its discretion in refusing to award offer of judgment sanctions by invoking the "interest of justice" exception, MCR 2.405 (D)(3).

The present case was originally mediated "non-unanimously" in plaintiffs' favor for the sum of $100,000. Plaintiffs offered to stipulate to entry of judgment in that amount and defendant countered with a $10,000 offer that was rejected. Thereafter, no response was made by plaintiffs to defendant's subsequent offer of a $25,000 judgment. This silence consequently constituted a rejection under MCR 2.405(C)(2)(b).

MCR 2.405(D) provides the basis for the imposition of costs following rejection of an offer to stipulate to entry of judgment, stating in pertinent part:

> (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
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> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree *must* pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
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> * * *
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> (3) The court shall determine the actual costs incurred. *The court may, in the interest of justice, refuse to award an attorney fee under this rule.* [Emphasis added.]

Actual costs, as defined by MCR 2.405(A)(6), are "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment."

The award of reasonable taxable costs is mandatory under MCR 2.405. This Court in *Luidens v 63rd District Court*, 219 Mich App 24, 30; 555 NW2d 709 (1996), has noted:

> The commentary on MCR 2.405 states that the "interest of justice" exception does not authorize courts to refuse reimbursement of incurred costs, other than attorney

fees, if the costs would normally be taxable under existing rules and statutes. 2 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 455.

However, with regard to the issue of attorney fee awards, the "interest of justice" provision of MCR 2.405(D) provides an exception to the general rule that actual costs "must" be paid. This exception has been narrowly construed. The *Luidens* Court, *supra* at 31-32, explained:

> The purpose of MCR 2.405 is "to encourage settlement and to deter protracted litigation." *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995). In the context of this purpose and the fact that the "interest of justice" provision is an exception to a general rule, this Court has held that, "absent unusual circumstances," the "interest of justice" does not preclude an award of attorney fees under MCR 2.405. *Gudewicz v Matt's Catering, Inc*, 188 Mich App 639, 645; 470 NW2d 654 (1991). In *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278-279; 505 NW2d 862 (1993), this Court held:
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> "The better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the "interest of justice" exception to the point where it would render the rule ineffective. [Citations omitted.]"
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> The *Hamilton* Court stated at 596:
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> "[W]hile the rule allows the trial court discretion to deny an award, "few situations will justify denying an award of costs under MCR 2.405 in the 'interest of justice.'" [Quoting 2 Martin, Dean & Webster, Michigan Court Rules Practice, author's comment, 1995 Supp, p 157.]"

A trial court must articulate a "compelling rationale" for application of the "interest of justice" exception. *Hamilton, supra* at 597. This Court in *Luidens, supra* at 33-36, established the parameters within which the exception should be applied:

> Case law offers some guidance regarding factors that do *not* fit within the "interest of justice" exception. This Court has specifically found that reasonable refusal of an offer, alone, is insufficient to justify not awarding attorney fees under MCR 2.405. *Butzer* at 278; *Gudewicz* at 645.
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> The factors offered as rationales by the trial court for denying attorney fees also fit into this category. There is almost always some degree of disparity of economic standing between the parties. MCR 2.405's purpose of encouraging settlement will be undermined if the economic position of the parties is used to determine whether attorney fees will be awarded. . . . We note that MCR 2.405 does not "require the court to

determine [a party's] relative ability to pay." *Sanders* [*v Monical Machinery Co*, 163 Mich App 689; 415 NW2d 276 (1987)] at 693.

Similarly, we read the "interest of justice" exception to require something more than merely that the losing party's position was "not frivolous.". . . . disparity of income and nonfrivolousness of a party's claim are factors that, like reasonable refusal of an offer, are too common to fit within the "interest of justice" exception.

Case law also offers some guidance regarding factors that *do* fit within the "interest of justice" exception. The "interest of justice" exception appears to be directed at remedying the possibility that parties might make offers of judgment for gamesmanship purposes, rather than as a sincere effort at negotiation. . . . evidence of such gamesmanship, e.g., as demonstrated by comparisons of offers to the mediation evaluation and jury verdict, constitutes a relevant factor in determining whether the exception applies. See *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 340; 525 NW2d 470 (1994).

We also believe that a case involving a legal issue of first impression or a case involving an issue of public interest that should be litigated are examples of unusual circumstances in which it might be in the "interest of justice" not to award attorney fees under MCR 2.405. [Emphasis in original.]

See also *Miller v Meijer, Inc*, 219 Mich App 476, 480; 556 NW2d 890 (1996); *Lamson v Martin (After Remand)*, 216 Mich App 452, 462-463; 549 NW2d 878(1996); *Butzer, supra*; *Stamp v Hagerman*, 181 Mich App 332, 336-337; 448 NW2d 849 (1989); *Rellinger v Bremmeyr*, 180 Mich App 661, 670; 448 NW2d 49 (1989); and *Sanders, supra*.

Despite the fact that an offer of judgment had been made by defendant and tacitly refused by plaintiffs, followed by a no cause verdict, the trial court in the instant case, citing subsection (3) of MCR 2.405(D), denied defendant's motion for offer of judgment sanctions. The court refused to award both costs and attorney fees, reasoning as follows:

You know, you guys did all right. You were willing to give away $25,000, you ended up not having to give anything at all. That's something of a profit too; isn't it?

* * *

Well, I like making decisions and this is one of those. I don't see anything in the Rule that requires the entry of costs. In fact, a portion of the Rule of offers to stipulate entry of judgments say in part in 2.405, parens d, subsection 3: The Court may, in the interest of justice, refuse to award an attorney fee under this Rule.

Now, I have a feeling that the purpose of the Rule is, of course, to encourage settlements. A number of lawyers use the Rule so as to reduce costs in coming back as they do in this case such as we have in attempting to levy some costs against the

unsuccessful party. But this was a novel situation. This was not a case where there was no claim whatsoever on its face. That's not true. There were two opposite positions that were taken during the trial. The jury chose to believe the one, obviously, over the other.

This is not the type of case which is brought on a flimsy thought that, perhaps, liability will be determined and damages will flow, but, rather, was apparently a situation where there's two versions of an accident in an intersection.

I don't have many intersection cases and I'm grateful for that. But that being so, I find it hard to penalize one party for holding on to their principles and saying, this is where we stand; this is a claim; we have evidence, testimony by witnesses as to how the event occurred.

Now, they can't guarantee an outcome from the jury, there's no way you can do that. But if that were not the Rule that the Judge could be flexible on it, then in a number of cases, people would say, well, we're just going to accept the offer of judgment whether we like it or not because we can't afford to take that type of a risk in the event that we lose.

I'm well aware of the fact, as was told earlier by Counsel, that there was a substantial mediation award. Apparently, two skilled mediators felt that the claim was worth – as I was told today – a hundred thousand dollars. I don't think I heard the figure before. And the jury comes back with a no cause.

I don't think it's the type of situation that merits costs. I think it would be terribly unfair to people. It would discourage lawsuits which people should be able to file if they think they have a basis and a claim to present. It's not a frivolous action by any means. As I indicated parenthetically before, even the defendant came out ahead of this because the $25,000.00 that they had offered on the judgment never had to be paid because the jury ruled otherwise. I'm going to deny the costs. Thank you.

After our thorough review of the record, we hold that the trial court abused its discretion in denying defendant's motion for costs and attorney fees. The trial court essentially based its decision to deny *both* costs and attorney fees on the non-frivolousness of plaintiffs' claim. However, costs "must" be awarded pursuant to MCR 2.405(D). With regard to attorney fees, the underlying reason given by the trial court in denying such fees is simply inadequate to justify application of the "interest of justice" exception. The reasoning of the *Luidens* Court, *supra* at 37, applies herein:

> [N]either the disparity of economic standing between the parties nor the nonfrivolousness of plaintiff's case is sufficient rationales to justify denial of attorney fees. As discussed above, these factors will obtain, to some degree, in most cases where an offer of judgment is rejected. They do not constitute "unusual circumstances" that justify denial of attorney fees under MCR 2.405. Nor do we find, in this instance,

> that the conjunction of these two factors, without more, constitutes a sufficiently "unusual circumstance" that justifies denial of attorney fees.

For this reason, we reverse the trial court's order denying costs and attorney fees and remand for a determination and order of reasonable costs and attorney fees in favor of defendant.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ Kathleen Jansen

[1] At the hearing, plaintiffs' counsel stated,

> Today I do not have any legal basis to oppose the assertion of the medical records' privilege. However, I don't believe that that the assertion goes to the employment records or the PIP file. I have no problem if this Court would rule against me on the medical records.